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No. 06-1037

Supreme Court, U.S.
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In the Supreme Court of the United States

Kentucky Retirement Systems, Commonwealth of Kentucky, and Jefferson County Sheriff's Department.

Petitioners,

v

Equal Employment Opportunity Commission.

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

AMICUS CURIAE BRIEF OF THE STATES OF MICHIGAN, MARYLAND, NEW MEXICO, SOUTH CAROLINA, TENNESSEE, WEST VIRGINIA AND THE COMMONWEALTH OF PUERTO RICO IN SUPPORT OF THE PETITIONERS

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QUESTION PRESENTED

This case involves the State of Kentucky's public employee retirement plan that includes normal and disability retirement benefits. A public employee who is eligible for retirement benefits based on attained age plus a minimum service requirement or based on years of service alone, is not eligible for disability retirement benefits. Because age may be a factor in determining eligibility for normal retirement benefits, it may be a factor in determining eligibility for disability retirement. The calculation of disability retirement benefits is based upon actual years of service plus the number of years remaining before the member reaches retirement age or eligibility based on years of service alone. Thus, age may be an indirect factor in determining the amount of disability retirement benefits. The question presented in the Petition is:

Whether any use of age as a factor in a retirement plan is "arbitrary" and thus renders the plan facially discriminatory in violation of the Age Discrimination in Employment Act?

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INTEREST OF THE AMICUS CURIAE

The issue presented is whether the State of Kentucky's retirement statute violates the Age Discrimination in Employment Act, (ADEA) 29 USC 621 *et seq*. Specifically, under Kentucky's statute a member is eligible for normal retirement benefits if he or she has 20 years of service or is age 55 with five years of service. A disability retirement is designed to replace a normal retirement if the member becomes disabled and can no longer work and is not yet eligible for a normal retirement. However, a member who is eligible for a normal retirement may not receive a disability retirement since he or she is already entitled to a retirement benefit. In calculating Kentucky's disability retirement benefit, it is assumed that the member would have worked to the normal retirement age of 55. Thus, a disabled member is given service credit of up to 20 years or until he or she reaches age 55.

States have an interest in enacting retirement laws that best meet the needs of their citizens without undue interference or disruption. Michigan and the undersigned States are concerned that the decision of the Court of Appeals,[1] which found that Kentucky's statute was discriminatory, will adversely impact their ability to enact retirement statutes that best meet their respective needs and the needs of their employees. Consequently, they file this amicus brief asking this Court to grant the Petition and reverse the Court of Appeals.

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[1] *Equal Employment Opportunity Commission v Jefferson County Sheriff's Department, Kentucky Retirement Systems and the Commonwealth of Kentucky*, 467 F 3d 571 (CA6 2006).

SUMMARY OF ARGUMENT

The ADEA was enacted by Congress to prohibit employers from terminating older workers for no reason except their age and from refusing to hire older workers simply because of their age. Kentucky's Retirement plan does neither of these. Instead, it seeks to ensure that all public employees in Kentucky are provided a benefit regardless of their age, when they're no longer able to work. Because Kentucky's Retirement Plan uses other reasonable factors besides the age of the employee to determine the benefit to be given to disabled employees, the Kentucky statute does not violate the ADEA.

REASONS FOR GRANTING THE PETITION

I. The Kentucky Statute does not violate the Age Discrimination in Employment Act.

The ADEA plainly states its purpose is to[2]:

> promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

The report of Secretary of Labor Wirtz, which was the basis for the enactment of ADEA, defined arbitrary age discrimination as "assumptions about the effect of age on [an employee's] ability to do a job when there is in fact no basis for these assumptions."[3]

As this Court has stated[4]:

> Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes.

The Kentucky Retirement Plan does not violate the ADEA because it is neither contrary to the purpose of the ADEA nor does it discriminate against a public employee covered by the retirement plan based upon his or her ability to do a job. Instead, the retirement plan provides a benefit to employees when they can no longer perform their jobs, regardless of age. In other words, any employee who can no longer work receives either a

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[2] 29 USC 621(b). (Emphasis added.)

[3] *Equal Employment Opportunity Commission*, 467 F 3d at 577.

[4] *Hazen Paper Company v Biggins*, 507 US 604; 610; 113 S Ct 1701; 123 L Ed 2d 338 (1993).

disability retirement or a normal retirement, both of which are calculated in the same manner, except it is assumed that the disabled member would have continued working until retirement age.

The United States Court of Appeals for the Sixth Circuit viewed the EEOC's claim as one of disparate treatment discrimination. This Court, however, in *Hazen Paper v Biggins*, held that "there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age."[5] Here, the employee's age is not the motivating factor in Kentucky's Retirement Plan.

The factor motivating Kentucky in its retirement plan, is to provide a similar level of protection to all members regardless of their age. Indeed the effect of Kentucky's Retirement Plan and its ability to ensure a benefit to all covered employees is one of age neutrality. Kentucky reaches this goal by providing retirement protection to an employee who either retires after attaining sufficient service and age benchmarks or who cannot work due to disability. If the employee already qualifies for a normal retirement due to his age and years of service, then that motive or purpose is achieved and there is no reason to have that person apply for a disability retirement.

The facts here establish that Mr. Lickteig became disabled when he was 61 years old after 17 years of service. He was not given service disability credit of 20 years because he was already eligible for a normal retirement benefit after 17 years of service. As noted, the overriding purpose of Kentucky's Retirement Plan is to ensure that a benefit is provided to employees who either become disabled and can no longer work or who have worked long enough to become eligible for a benefit under a normal retirement. Here that purpose was met since Mr. Lickteig was eligible for a normal retirement.

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[5] *Hazen Paper Company*, 507 US at 609.

This Court has held in a disparate treatment case that "proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment."[6] But here there is no proof of discriminatory motive in Kentucky's Retirement Plan. The Retirement Plan simply says that a person who qualifies for a normal retirement can't receive a disability retirement when he or she already has earned a normal retirement. As this Court held in *Hazen*, "an employer does not violate the ADEA just by interfering with an older employee's pension benefits that would have vested by virtue of the employee's years of service."[7]

This Court's decision in *Smith v City of Jackson* is instructive.[8] In *Smith* the city gave a higher percentage pay raise to police officers with less than 5 years of service than to other police officers. Most police officers with more than 5 years of service were older. These officers sued, claiming that they were discriminated against because of their age. This Court held that the ADEA does not prohibit action where the differentiation in treatment was based on reasonable factors other than age discrimination.[9] The Court found that the difference in the percentage of pay increase was reasonably related to the City's "perceived need to raise the salaries of junior officers to make them competitive with comparable positions in the market."[10] As a result, this Court affirmed the dismissal of the Plaintiff's complaint.

Likewise, Kentucky's Retirement Plan is intended to provide a benefit to employees who can no longer work. It is not intended to discriminate against older workers, but rather seeks to ensure

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[6] *Teamsters v United States*, 431 US 324, 335, n15; 52 L Ed 2d 396; 97 S Ct 1843 (1977) quoted with approval in *Hazen Paper Company*, 507 US at 609.

[7] *Hazen Paper Company*, 507 US at 613.

[8] *Smith v City of Jackson*, 544 US 228; 125 S Ct 1536; 161 L Ed 2d 410 (2005).

[9] *Smith*, 544 US at 238, 241.

[10] *Smith*, 544 US at 242.

that a covered employee receives some benefit if he or she can't work, regardless of his or her age. Kentucky's plan has nothing to do with discrimination against older workers who are seeking a job or who wish to retain their job. Instead, Kentucky's Retirement Plan is an attempt to assist employees who can no longer perform their job due to a disability. Accordingly, this Court should grant Kentucky's Petition and reverse decision of the Court of Appeals.

II. Implications of the Interpretation given by the Court of Appeals.

The Court of Appeals' decision has untold adverse implications for the retirement systems of many States that have retirement plans. This is because the Court of Appeals has held that a retirement plan that merely uses age as one of the factors to determine the amount and eligibility for a particular benefit is subject to challenge on the basis that it is discriminatory. However, the Kentucky Retirement Plan is a reasoned decision of the Kentucky Legislature. Kentucky's Retirement Plan, like the retirement plans enacted by other States for their respective public employees, were enacted to meet the needs of the governmental employees and the State.

What the Court of Appeals failed to recognize or fully understand is that *all* retirement benefits are not equal among *all* employees. In Kentucky, as in most States, the more years that a person works and the higher a person's salary, the larger his or her pension will be. A 60-year-old person could have worked for 30 years at a secretarial position and not receive as much in retirement as a 55-year-old department director with only 10 years of service. This doesn't mean that the statute discriminates against the 60-year old employee, it only means that other factors such as date of hire and pay rate also determine retirement amount.

Under Kentucky's Retirement Plan, if a 25-year-old employee becomes disabled after the fifth year of employment, he or she

will only be credited with 10 years of service. His or her benefit will be based on 10 years, even though he or she may have intended to work for 35 years and receive a normal retirement benefit at age 55. In the case of Mr. Lickteig while he did not receive a "full" disability retirement benefit of 20 years, he nonetheless is eligible to receive a normal retirement benefit due to a combination of his age and his years of service. Mr. Lickteig has not suffered age discrimination with respect to his eligibility or ability to receive a benefit. Rather, the purpose of Kentucky's statute is to ensure that those who become disabled receive a benefit. Neither that purpose nor Kentucky's method of achieving that purpose, as contained in its retirement plan, violate the ADEA.

CONCLUSION

The Petition For A Writ of Certiorari should be granted.

Respectfully submitted

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